73-119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

vs.

WILLIAM J. BAXLEY, in His Capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in His Capacity as Prosecuting Attorney for the Tenth Judicial Circuit of Alabama; and HERBERT JENKINS, JR., in His Capacity as Assistant City Attorney for the City of Birmingham, Alabama,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

MOTION TO DISMISS APPEAL OR AFFIRM

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QUESTIONS PRESENTED

I

Whether or not this appeal should be dismissed because it was not timely filed in compliance with Rule 13 of the Revised Rules of the Supreme Court.

II

Whether or not the principles of the series of cases headed by **Younger v. Harris,** 401 U.S. 376 (1971), are applicable to a pending state court proceeding to abate a nuisance which proceeding is pursuant to state statutes in aid of state criminal laws.

STATEMENT OF FACTS

The appellee, Herbert Jenkins, Jr., as Assistant City Attorney for the City of Birmingham, filed on behalf of the State of Alabama, a suit dated March 7, 1973, in the Circuit Court for the Tenth Judicial Circuit of Alabama—In Equity—Case Number 177-199, against appellants, MTM, Inc.; Chester McKinney; Thomas McGary and fictitious parties, under the Alabama Nuisance Law, Title 7, Sections 1091-1108, Code of Alabama 1940 (Recompiled 1958), to abate the maintenance of a nuisance at the Pussycat Adult Theatre at 7610 First Avenue North in the City of Birmingham, Alabama, which was for the continued and repeated violations of the City of Birmingham Obscenity Ordinance Number 67-2, and based upon numerous convictions for violation of said ordinance by the appellants which said convictions cumulated to a noxious public nuisance.

A temporary injunction closing the nuisance was granted by the State Court against appellants on May 24, 1973, after a hearing, and in the meantime the appellants filed the present suit in the U. S. District Court for the Northern District of Alabama seeking to enjoin the enforcement of the temporary injunction and a declaratory judgment that the State statute under which the temporary injunction was obtained is unconstitutional as written and or as applied. No appeal was taken in the State Court proceedings as to the issuance of the temporary injunction although an appeal was available in the

State Courts. No final hearing upon the issue of whether the injunction should be made permanent was had at the request of appellants or with their approval pending the outcome of the federal suit.

After a hearing in the U. S. District Court before a three-judge panel, a judgment was entered on October 18, 1973, denying the relief sought based upon the principles of equity, comity, and federalism announced in the case of **Younger v. Harris,** 401 U. S. 376 (1971).

A Notice of Appeal to the Supreme Court of the United States was filed by appellants on the 9th day of November, 1973.

On January 21, 1974, this appellee received appellants' Statement of Jurisdiction which was filed on January 16, 1974, in the Supreme Court.

I

MOTION TO DISMISS

Pursuant to paragraph 1(a) of Rule 16 of the Revised Rules of this Court, the appellee, Herbert Jenkins, Jr., in his capacity as Assistant City Attorney for the City of Birmingham, Alabama, moves this Honorable Court that the appeal be dismissed for that the appeal was not taken in conformity to the rules of this Honorable Court.

On the 18th day of October, 1973, a judgment was entered in the United States District Court for the Northern District of Alabama—Southern Division—by a three-judge panel in Civil Action Number 73-427-S. A Notice of Appeal was filed on the 9th day of November, 1973, to the Supreme Court of the United States. Rule 13 of the Revised Rules of the Supreme

Court required the appellants to docket the case accompanied by the Statement of Jurisdiction within sixty days from the filing of the Notice of Appeal. This is an appeal pursuant to Section 1253 of Title 28 of the United States Code as is stated by appellants in the Statement of Jurisdiction filed in this court on January 16, 1974. Therefore, this case was not docketed within sixty days which expired on December 17, 1973, but was on the nintieth day from the filing of the Notice of Appeal. This appellee has not received notice of the date of docketing in accordance with Rule 13(3), but was advised by a member of the Clerk's Office of this Court that the case was docketed on January 16, 1974, and given the number appearing in the style of this appeal.

Appellee has not received a notice of an extension of time for such docketing, and therefore the appeal was not docketed within the sixty days allowed from the filing of the Notice of Appeal and is not timely.

For the foregoing reason, the appellee respectfully moves that this appeal be dismissed.

II

MOTION TO AFFIRM

In the alternative, the appellee moves this Honorable Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama—Southern Division—pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States on the ground that the appeal fails to present any substantial federal question and further that this case is not one for appeal and does not require further argument.

The issue involved here then has been answered both in **Younger v. Harris,** 401 U.S. 37, and in **Mitchum v. Foster,** 407 U.S. 225. This Honorable Court made it clear in these two

cases that federal intervention in state court proceedings which are pending is not permitted in the absence of certain exceptional circumstances.

The appellants seem to believe that the judgment of the District Court was wrong because of its determination that the proceeding in question was in the nature of a criminal action. Although they admit the numerous convictions for violation of the City obscenity laws, it is insisted that the State Nuisance Statute permits only a civil action and not a criminal one, and that therefore the principles of **Younger v. Harris,** supra, do not apply. The action in the state court sought to be enjoined is still pending. It was an action taken in aid of the criminal laws of this state and its subdivisions. In **Gibson v. Berryhill,** 411 U.S. 564, this court indicates that the principles of **Younger v. Harris** are applicable to at least quasi-criminal cases pending in state courts and that if a state court has held an action is quasi-criminal in nature then the federal court will so consider it and apply **Younger** principles. The Alabama Supreme Court has held that an action under the statutes here involved may be deemed a quasi-criminal action. **Ridge v. State,** 206 Ala. 349, 89 So. 742. Obviously, this appeal presents an unsubstantial question and does not deserve this court's attention nor does it need further argument.

Furthermore, the principle of **Kenosha v. Bruno,** — U.S. —, 93 S. Ct. 2222, — L. Ed. 3rd —, that a civil rights action for declaratory and injunctive relief against municipalities will not be entertained in federal court is also applicable to actions against the state even though such a suit only names prosecuting officials in their official capacities and fails to allege that such parties acted outside their official capacities. In such cases, the relief sought is actually against the government and should not be allowed. **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682 (1949). This principle is aside from that of Prosecuting Officials' judicial immunity in such cases. **Pierson v. Ray,** 386 U.S. 547.

CONCLUSION

For the reasons stated, it is respectfully moved that the Motion to Dismiss or Affirm be granted.

Respectfully submitted

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